UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1, SUBREGION 34

U.S. COSMETICS CORPORATION and TYLER HOAR, AN INDIVIDUAL	Case No. 01-CA-135282
U.S. COSMETICS CORPORATION and WILLIAM ST. HILAIRE, AN INDIVIDUAL	Case No. 01-CA-139115

AMENDED POST-TRIAL MEMORANDUM SUBMITTED TO
THE ADMINISTRATIVE LAW JUDGE

Respondent U.S. Cosmetics Corporation "USCC") hereby respectfully submits this Amended[1] Post-Trial Memorandum in support of its request that the Administrative Law Judge, the Honorable Ira Sandron, dismiss each and every one of the counts brought against Respondent by the Charging Parties ("CPs") and by the General Counsel ("GC") of the National Labor Relations Board (hereafter, the "NLRB"). In support hereof, Respondent USCC respectfully states as follows:

USCC respectfully submits that it (1) did not discharge the two Charging Parties, ("Hoar" and "St. Hilaire") because of their union activities; (2) it did not expedite a wage increase in order to discourage unionization; (3) it did not interrogate employees about their union activities; (4) it did not interfere with a NLRB investigation by allowing employees to select whether they wanted to have counsel present while they talked to the

[1] This Amended version contains the missing Certificate of Service and corrects certain typos and formatting errors. It does not contain substantive changes that go to the merits from the version filed on April 22.

NLRB; (5) it did not issue rules in an Employee Handbook that were designed to discourage unionization, or which had the effect of discouraging unionization; (6) it did not disparately treat employees based on their union activities.

I. LEGAL STANDARD

The Board is required "to follow the law as set forth by the relevant court of appeals." *NLRB v. Flambeau Airmold Corp.,* 178 F.3d 705, 712 (4th Cir.1999). The Second Circuit reviews the decisions of the NLRB to ensure there is substantial evidence – considering the record as a whole—to support the NLRB's findings. *National Labor Relations Board v. Caval Tool Division, Chromalloy Gas Turbine Corporation,* 262 F.3d 184, 188 (2d Cir.2001). However, the Second Circuit in *Spentonbush/Red Star Cos. v. NLRB,* 106 F.3d 484, 490 (2d Cir.1997) held that:

> "[t]he 'substantial evidence' standard does not leave factual questions wholly to the NLRB; to the contrary, it requires [courts] to take account of the evidence that undermines the NLRB's conclusions." *Caremore, Inc. v. NLRB,* 129 F.3d 365, 369 (6th Cir.1997). This Court has chastised the Board for its "disregard" of probative evidence and criticized the "practice followed all too often by the Board of rejecting evidence that does not support the Board's preferred result." *Spentonbush/Red Star Cos. v. NLRB,* 106 F.3d 484, 490 (2d Cir.1997).

The Supreme Court has held that "[w]hen the Board purports to be engaged in simple factfinding, ... it is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands." *Allentown Mack Sales and Service, Inc. v. NLRB,* 522 U.S. 359, 118 S.Ct. 818, 829 (1998).

II. USCC's TERMINATIONS OF THE CHARGING PARTIES HAD NOTHING TO DO WITH THEIR UNION ACTIVITES

A. Legal Standard

An employer violates Section 8(a)(3) of the Act by disciplining or discharging an employee for engaging in Section 7 union activity. *See* 29 U.S.C. § 158(a)(3); *NLRB v. Transp. Mgmt. Corp.,* 462 U.S. 393, 397–98 (1983), *abrogated on other grounds by Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries,* 512 U.S. 267 (1994). Such actions also derivatively violate Section 8(a)(1) because antiunion-motivated discipline or discharge necessarily discourages union membership or activities. *See Office & Prof'l Emps. Int'l Union v. NLRB,* 981 F.2d 76, 81 n. 4 (2d Cir.1992). The test for a Section 8(a)(3) violation involves a multi-step burden-shifting framework, as articulated in *Wright Line,* 251 NLRB 1083 (1980). *See Transp. Mgmt. Corp.,* 462 U.S. at 403 (approving *Wright Line* test); *NLRB v. S.E. Nichols, Inc.,* 862 F.2d 952, 957 (2d Cir.1988) (applying *Wright Line* test).

The Board's General Counsel first has the burden to show that the employer (1) had knowledge that employees were engaged in protected union activity and (2) that the employer's decision to discipline or discharge those employees was motivated, at least in substantial part, by hostility toward that union activity. *N.L.R.B. v. Sprain Brook Manor Nursing Home, LLC*, 630 Fed.Appx. 69 (2d Cir. Nov. 18, 2015)(*citing Abbey's Transp. Servs., Inc. v. NLRB,* 837 F.2d 575, 579 (2d Cir.1988)). Once the General Counsel makes that showing, the burden shifts to the employer to demonstrate, by a preponderance of the evidence, that it would have taken the same action absent the protected union activity. *See S.E. Nichols,* 862 F.2d at 957.

B. The GC Cannot Meet Its Burden of Persuasion That The Record As A Whole Supports A Finding That USCC Terminated Hoar and St. Hilaire Because Of Their Union Activities.

The factual findings of the NLRB will only be upheld if they are supported by the record ***as a whole***. *National Labor Relations Board v. Caval Tool Division, supra,* 262 F.3d at 188 ("Factual findings of the Board will not be disturbed if they are supported by substantial evidence in light of the record as a whole.") Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks omitted). It is the General Counsel, and not the employer, that bears the burden of proving the General Counsel's *prima facie* case, including the knowledge requirement. *See Firestone,* 539 F.2d at 1338–39 ("[T]he burden of establishing ... knowledge rest[s] on the Board."). A supervisors' knowledge of an employees' union activity is not *automatically* imputed to the employer. *See id.* at 1339 (refusing to impute supervisors' knowledge of employees' union activity to decision-maker).

1. <u>There Is No Evidence That USCC Had Knowledge That Hoar And St. Hilaire Were Engaged In Protected Union Activity</u>

In *Transportation Management Corp.,* the Supreme Court approved the test set forth by the Board in *Wright Line,* 251 N.L.R.B. 1083 (1980), for mixed-motive cases. Under that test, the General Counsel bears the burden of making a *prima facie* case that the challenged employment decision was at least partly motivated by discriminatory intent. *See Medeco Sec. Locks, Inc. v. NLRB,* 142 F.3d 733, 741–42 (4th Cir.1998). Meeting this burden requires the General Counsel to prove "(1) that the employee was engaged in protected activity (2) that the employer was aware of the

activity, and (3) that the activity was a substantial or motivating reason for the employer's decision." *FPC Holdings, Inc. v. NLRB,* 64 F.3d 935, 942 (4th Cir.1995). The employer-knowledge requirement entails proving knowledge "on the part of the company official who actually made the discharge decision." *Firestone Tire & Rubber Co. v. NLRB,* 539 F.2d 1335, 1338 (4th Cir.1976); *see Vulcan Basement Waterproofing of Illinois, Inc. v. NLRB,* 219 F.3d 677, 685 (7th Cir.2000); *Pioneer Natural Gas v. NLRB,* 662 F.2d 408, 412 (5th Cir.1981). Even if the General Counsel meets this burden, the employer can avoid liability if it can prove that the employee would have been discharged for legitimate reasons even absent the protected activity. *See Medeco Sec. Locks, Inc.,* 142 F.3d at 742.

a. There Is No Credible Evidence That St. Hilaire Helped Make The Union Sign

Hoar's and St. Hilaire's accounts differed as to how the poster was made and where it was made. Hoar unequivocally stated that he himself drafted the poster on his own computer and the second was a copy. Hoar Tr. 1520:1-7; 1580:21-25. In contrast, St. Hilaire claimed it was typed on some third party's private computer in an office, and that "[i]t wasn't Tyler's home computer." St. Hilaire Tr. 2611. They cannot be both telling the truth. A logical explanation is that St. Hilaire does not know how it was made on which computer because he really did not participate in creating it, and that he is claiming participation only so that he can piggy-back off of Hoar's lawuit. Hoar was the first of the Charging Parties to file a claim with the NLRB, even though he was terminated after St. Hilaire was. Further evidence of the fact that St. Hilaire was not involved in the creation and posting of the posters is that never told the unemployment agency that he was terminated for union activity; he said it was for making threats and

misconduct. St. Hilaire at 2648. Thus, because of St. Hilaire's wholly contradictory testimony about the poster's creation, St. Hilaire has failed to provide credible evidence that he was actually involved in the protected activity of posting the two posters.

b. There Is No Credible Evidence That Any Supervisor Knew About Hoar's and St. Hilaire's Involvement In The Union Activity

Every witness who testified on this issue swore that there was no evidence that any supervisor knew about Hoar's and St. Hilaire's union activity. [2] Not a single one of the GC's witnesses testified that they had any evidence that a supervisor knew of Hoar's or St. Hilaire's alleged protected activity. Quite the opposite; they testified that those who engaged in protected activity made sure that the supervisors and management did not know who was involved in the protected activity, McCoil Tr. 1424-29 (we made effort not to discuss in front of management); McCoil Tr. 1432 (never told supervisors or management who put up the sign); Hoar Tr. 1523 (no one told supervisors or

[2] St. Hilaire did claim that one co-worker, Gerow, knew that St. Hilaire was involved in union activity. Incredibly, St. Hilaire initially tried to contort the truth to claim that Mike Gerow was his "lead" (St. Hilaire Tr. 2690) when all the evidence was that the lead was Jason Martin. Martin Tr. 2313; Desjardin Tr. 2420 (testifying that the two leads were Mark LePage and Jason Martin). St. Hilaire then back-tracked and claimed that Gerow was merely in training to possibly become a lead, and that he had no idea whether he ever became a lead. St. Hilaire Tr. 2690. In fact, he did not. In any event, St. Hilaire admitted that he had no evidence that Gerow ever discussed St. Hilaire's union activity with any of the decision-makers. St. Hilaire Tr. 2692. To the extent that the GC incorrectly attempts to claim that Gerow was management, it is highly unlikely that any finding supporting that view would receive deference, in light of the overwhelming facts contrariwise. *New York University Medical Center v. N.L.R.B.*,156 F.3d 405 (2nd Cir. 1998) (explaining that the Second Circuit does not give deference on NLRB supervisor determinations)(*citing Spentonbush,* 106 F.3d at 492 ("the Board's biased mishandling of cases involving supervisors increasingly has called into question our obeisance to the Board's decisions in this area"); *Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700, 704 (8th Cir.1992) ("[S]crutiny is particularly appropriate in cases where the Board determines supervisory status .... [because] our review necessarily becomes more probing when the Board has exhibited a pattern of applying the statute inconsistently."); *Children's Habilitation Ctr., Inc. v. NLRB*, 887 F.2d 130, 132 (7th Cir.1989) ("More important than verbal niceties in the standard of review is judicial impatience with the Board's well-attested manipulativeness in the interpretation of the statutory test for 'supervisor.' ").

management who put up the sign); St. Hilaire Tr. 2685-86 (never disclosed to decision-makers that he was involved in any protected activity).

There was no evidence that other employees told supervisors or management about the Charging Parties' protected activity. Hoar Tr. 1575-6; St. Hilaire Tr. 2704 (no information that anyone who knew about his union activity ever told management).[3] They made sure no supervisors or management personnel were in the area when they discussed unionization or engaged in protected activity. Hoar Tr. 1557, 1560-61; St. Hilaire Tr. 2702. They made efforts to hide their union activity and to ensure that supervisors did not know about it. St. Hilaire Tr. 2703. They admitted they had no evidence any supervisors or management knew which employees were involved in protected activity. Hoar Tr. 1583. The best that Hoar could say was that, after he was already terminated and brought his NLRB claim, management then became aware that he brought an NLRB charge and claimed therein that he was involved in protected activity; but he has no basis to claim that they knew about his role in protected activity before he was terminated. Hoar Tr. 1584-85. Further, Hoar never discussed unionization at all with Judy Jones. Hoar Tr. 1576. Production associate Jon Lasko also confirmed that USCC management never discussed unions or unionization with the employees. Lasko Tr. 1624. Desjardin testified that he never heard any discussion of unionization or heard any speculate about who posted the union signs. Desjardin Tr. 2470.

c. There Is No Credible Evidence That Any Decisionmaker Knew About Hoar's and St. Hilaire's Involvement In The Union Activity

Both the Charging Parties and the decisonmakers in the terminations all testified that there is no evidence that the decisionmakers knew that the Charging Parties were

[3] This testimony makes the small plant doctrine inapposite.

involved in any union activity. All the documentary evidence related to the terminations evinces that union activity had nothing to do with the decision to terminate Hoar and St. Hilaire. Resp. (hereafter, "R.") ex. 2.

St. Hilaire testified that Dennis Desjardins and Judy Jones both interviewed him together about his threatening texts and were involved in his termination decision. St. Hilaire Tr. 2632,2638, 2642. Both Desjardin and Judy Jones were former employees at the time of their testimony and had no motivation or financial interest in favoring the employer with their testimony. Tr. 2397, 1978-79. They were completely credible witnesses because of their neutrality and lack of continuing association with USCC. In fact, St. Hilaire described Desjardins as a friend, (St. Hilaire Tr. 2636), which underscores that Desjardin was not a biased witness against him. Desjardins and Judy Jones both testified that they did not know of St. Hilaire's union activity (Desjardin Tr. 2435-36) and it had nothing to do with why he was terminated. Desjardin Tr. 2434. They testified that he was terminated only because he violated policy and engaged in misconduct, by making threats of physical violence against a co-worker. (Desjardin Tr. 2425-26. Takagi approved this termination. Desjardin Tr. 2434. St. Hilaire admitted he had never disclosed his union activity to them either. St. Hilaire Tr. 2685-86. Takagi testified that he did not know about the union activity of St. Hilaire or Hoar. Takagi Tr. 532-34; 500. Takagi did not even know whether the sign was posted by someone in the company. Takagi Tr. 346-7. The only factors considered in the termination was the misconduct. Takagi Tr. 583.

Hoar testified that the persons involved in the decision to terminate him were Desjardins and Judy Jones. Hoar Tr. 1405-06, 1590. The Charging Parties both

acknowledged that there was no basis to claim that any decision-makers knew about their protected activity. St. Hilaire Tr. 2624-5 (never discussed with any of the decision-makers who posted the poster); St. Hilaire Tr. 2692 (no evidence that anyone ever informed the decision-makers in his termination about his involvement in union activity); St. Hilaire Tr. (no evidence decision-makers knew who put up the signs); Hoar Tr. 1575-6. They presented no evidence that (termination) decision-maker Judy Jones ever interrogated any employees about their union activities at all, and certainly not before both St. Hilaire and Hoar were already terminated. Hoar Tr. 1611; St. Hilaire Tr. 2719. Hoar never discussed unionization at all with Judy Jones. Hoar Tr. 1576; Takagi Tr. 532-34 (testifying he did not know of Hoar's union activity before his termination); Takagi 536 (union activities had nothing to do with terminations).

Moreover, in addition to the fact that there is no testimonial evidence to support the allegation that the decision-makers knew about the Charging Parties' alleged activity, all the documentary evidence makes clear that the reason for the Charging Parties' terminations had nothing to do with their union activity. R. ex. 2.

2. <u>There Is No Evidence That The Employer's Decision To Discipline Or Discharge Those Employees Was Motivated, At Least In Substantial Part, By Hostility Toward That Union Activity.</u>

In *Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries,* 512 U.S. 267, 278 (1994), the Supreme Court made clear that the NLRB must "first require[] the employee to persuade it that antiunion sentiment contributed to the employer's decision. Only then [can] the NLRB place the burden of persuasion on the employer as to its affirmative defense." Everyone who testified,

including the GC's own witnesses, admitted that there was zero evidence of anti-union animus at USCC.

The non-management production associates were unanimous in their agreement that they never witnessed anti-union animus. St. Hilaire Tr. 2712-15 (management never made any anti-union statement; management never made any promises or threats to discourage unionization, and in fact never discussed unions at all with them); Hoar Tr. 1577 (no anti-union animus ever displayed); McCoil Tr. 1430-32 (no manager ever expressed dislike of unions, and no threats or promises were made to discourage unionization); . St. Hilaire Tr. 2711-12 (no information about whether decisionmakers like unions or not). Production associate Lasko testified that he never heard any anti-union statements or witnessed any anti-union animus by management or supervisors at USCC. Lasko Tr. 1623.

Mr. Takagi and the company itself both originate in a culture where there are cooperative relations between management and employers – Japan -- and unions are not regarded with disfavor and he does not oppose them. Takagi Tr. 536 -37.[4] The GC introduced no evidence of any discussions amongst management employees that constituted anti-union animus. In fact, Jones testified that she promptly did research to ensure that the company did not do anything that was not permissible. Jones Tr. 878-9. The managers agreed that there were no discussions that indicated anti-union sentiment. Desjardin Tr. 2469; Takagi Tr. 342 (no discusson); Takagi Tr. 566 (no suspicions about who was involved). Dispositively, there was not a single document introduced into evidence that evinces anti-union sentiment. The posters were not taken seriously.

[4] Takagi testified that he had no anti-union animus, but the ALJ would not allow such testimony. Takagi Tr. 536-7. USCC takes exception to that ruling.

Because it was so amateurishly drafted without any union insignia and was posted on an outside door (Takagi Tr. 347) they considered the possibility it was a prank and were soon forgotten and the issue was dropped. There was no "heat" around the subject; employees did not even hear even hear about it until around the time the CPs filed suit. Lasko Tr. 1625 (did not even hear about the posted sign until after wages were increased). There appeared to be no discussion afterwards about the sign being posted on the production floor. Desjardin Tr. 2470-71.

3. The Charging Parties' Protected Activity Was Not A Substantial Or Motivating Factor Behind USCC's Decision To Terminate Them

The third prong of the GC's burden of persuasion requires proof that the employee's protected union activity was a substantial or motivating factor behind the employer's decision to take the adverse employment action." *NLRB v. Matros Automated Electrical Construction Corp.,* 366 Fed.Appx. 184, 187 (2d Cir.2010) (*citing Golden State Foods Corp.,* 340 NLRB 382, 385 (2003)). The GC has established absolutely no causal connection between the decision to terminate the CPs and the CP's protected activity. The documentary evidence makes explicitly clear that the only considerations were the CP's actual misconduct. *See* R. ex. 2.

Two witnesses, who were former employees and had no financial or other interest in the outcome (Jones Tr. 1878-79; Desjardin Tr. 2397) testified that it was only the misconduct of the CPs that they considered. Desjardin Tr. 2435-36; 2468) . Neither had any knowledge that either Hoar or St. Hilaire had been involved in union activity. Jones Tr. __; Desjardin Tr. 2436; 2468). The testimony of both CPs also made plain that the only matters discussed during the investigations into their misconduct was the actual

misconduct. Moreover, given that both of these terminations were prompted by complaints that arose with rank-and-file Production associates who were not management, it is clear that the timing had nothing to do with the union activity, but instead arose because of the timing of the misconduct itself, and when the complaints were made about such misconduct. R. ex. 2; exhibits (showing written statement of Jacob Rodriguez).

C. Even If The GC Had Sustained Its Burden Above, Which It Cannot, It Still Cannot Prevail Because USCC Can Demonstrate, By A Preponderance Of The Evidence, That It Would Have Taken The Same Action Absent The Protected Union Activity.

Under the Second Circuit's jurisprudence, this portion of the multi-prong test should never be reached in this case because the GC cannot meet its initial burden of persuasion by proving that 1) the employee was engaged in protected activity, 2) the employer was aware of this activity, and 3) the employee's protected union activity was a substantial or motivating factor behind the employer's decision to take the adverse employment action." *NLRB v. Matros Automated Electrical Construction Corp.,* 366 Fed.Appx. 184, 187 (2d Cir.2010) (*citing Golden State Foods Corp.,* 340 NLRB 382, 385 (2003)). [5]

However, if the ALJ were to find that the GC has met this burden of persuasion, USCC may avoid liability if it demonstrates by a preponderance of the evidence that it

[5] Notably, as the above caselaw in this Circuit indicates, it is only at this stage that considerations such as timing, disparate treatment, departure from past practice or shifting or pretextual reasons comes in to focus and consideration. However, none of those considerations are taken into account if the GC cannot first demonstrate that the employer knew that St. Hilaire and Hoar engaged in protected activity and that such activity motivated USCC's terminations of them. Because the GC cannot show that any decisonmaker at USCC knew about St. Hilaire's or Hoar's involvement, and because they cannot show it motivated the termination, these other considerations do not come into play.

would have reached the same decision absent the protected conduct. *NLRB v. G & T Terminal Packaging Co*., 246 F.3d 103, 116 (2d Cir.2001) (internal quotation marks and citation omitted)**.** The instant case is not a dual motive case because all witnesses agree that there is zero evidence of anti-union animus. If there were such evidence, in a dual motive case, one would apply what has become known as the *Wright Line* test, *Wright Line,* 251 N.L.R.B. 1083 (1980), *enforced,* 662 F.2d 899 (1st Cir.1981), *cert. denied,* 455 U.S. 989 (1982), approved by the Supreme Court in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 103 S.Ct. 2469, 2472 (1983): "[I]t is undisputed that if the employer fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons that he proffers are pretextual, the employer commits an unfair labor practice. He does not violate the NLRA, however, if any anti-union animus that he might have entertained did not contribute at all to an otherwise lawful discharge for good cause."

Under that test, in proceedings before the ALJ and the board, the burden initially is on general counsel to prove by a preponderance of the evidence that the employee's conduct protected by § 7 of the act "was a substantial or a motivating factor in the discharge." Even if it is established, however, that "a desire to frustrate union activity" is a motivating factor in the discharge, the employer can still avoid being held by the board to be in violation of the act by proving by a preponderance of the evidence "that the discharge would have occurred in any event and for valid reasons * * *." *NLRB v. Transportation Management Corp., supra*, 103 S.Ct. at 2473.

The GC can then attempt to disprove the explanation provided by the employer. "However, if the evidence establishes that the reasons given for the [r]espondent's action

are pretextual—that is, either false or not in fact relied upon—the [r]espondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the ... analysis." *Golden State Foods,* 340 NLRB at 385. "Unlawful motive may be demonstrated not only by direct evidence but by circumstantial evidence, such as timing, disparate or inconsistent treatment, expressed hostility toward the protected activity, departure from past practice, and shifting or pretextual reasons being offered for the action." Fernbach ex rel. N.L.R.B. v. Raz Dairy, Inc., 881 F.Supp.2d 452 (citing Real Foods Co., 350 NLRB 309, 312 n. 17 (2007) (internal citation omitted)).

USCC can establish, by a preponderance of the evidence, that it would have taken the same action against both Hoar and St. Hilaire absent the protected union activity. *See S.E. Nichols,* 862 F.2d at 957.

1. <u>USCC Has Produced Substantial Evidence That It Terminated St. Hilaire Because He Made Threats Of Bodily Harm Against A Co-Employee.</u>

It is beyond dispute that the reason that Bill St. Hilaire was terminated is because he made threats of physical violence to a co-worker. GC ex. 24; GC ex. 27; Gc. Ex. 28; R. ex. 13; R. ex. 14. The co-worker, Jon Lasko, was the one who initiated the complaint by going to management. Lasko Tr. 1629-31. Human Resources Manager Judy Jones and St. Hilaire's manager, Dennis Desjardin, promptly interviewed both Lasko and St. Hilaire. All witnesses who testified on this issue (Lasko, Jones, Desjardin, St. Hilaire) agreed that Lasko produced evidence in terms of text messages that proved that St. Hilaire was making threats of physical violence. Lasko Tr. 1632-3, 1635, 1637, 1642,

1644-45; Desjardins Tr. 2426, 2430-31; Jones Tr.863-865. St. Hilaire did not dispute that he made such threats of physical violence. St. Hilaire Tr. 2628-2629, 2631.

The employees had just been trained on the company's zero tolerance for threats and harassment. Pockoski testified that St. Hilaire's conduct was a violation of the company policy and it was of utmost importance that the company ensure a safe environment for its employees. Pockoski Tr. 947. Moreover, given that she had read in a Putnam newspaper that St. Hilaire was involved in incidents of violence with his wife and a judicial protective order had been issued and violated (Pockoski Tr. 931, 947-8), this weighed into the seriousness of the concerns about safety and violence in the workplace. St. Hilaire admitted that he had a criminal record with violence-related convictions for disorderly conduct. St. Hilaire Tr. 2602-2606. Because of the potential liability to the company once it received the Lasko complaint about St. Hilaire's threats of violence, from a liability perspective alone, the company could not risk retaining St. Hilaire. Pockoski Tr. 947.

Takagi also was concerned about the potential corporate liability that could arise from St. Hilaire's threats of violence should St. Hilaire follow through with his threats. Takagi Tr. 570-71. Moreover, the fact that St. Hilaire initially lied when he was questioned about the threats was an independent violation of company policy, which requires cooperation with company investigations. Takagi Tr. 573. Desjardin Tr. 2432-33 (confirming he witnessed St. Hilaire prevaricate at first). R. ex. (St. Hilaire first tried to lie and deny that he made threats); *see also,* St. Hilaire Tr. 2641:22-23 (admitting that at first he tried to play dumb like he did not know what they were talking about in terms of the threats, because he did not know that Jones had already seen for herself the

threatening messages). Takagi testified that employee safety from a violence-free environment is of the utmost concern to the company, Takagi Tr. 567-8, and therefore the threat of violence was an immediately terminable offense. Takagi was the ultimate decisionmaker on the St. Hilaire termination. Desjardin Tr. 2434. No one ever mentioned to Takagi that St. Hilaire was involved in union activity, and it had nothing to do with Takagi's decision to terminate him. Takagi Tr. 562-4, 566. He was terminated solely and exclusively because of his misconduct. Takagi Tr. 583.

Jones (who no longer worked at USCC, so had no interest in the outcome of the case) testified that USCC decided that it needed to protect workers against an unsafe work environment and the company could not risk the liability of a potential work place violence incident after receiving notice of the threats. Desjardins remembered that he and she both said "That's too serious of a situation of threatening someone else." Desjardin Tr. 2433. Desjardin made clear that threatening violence in the workplace was an immediate terminable offense because it was criminal in nature and he needed to keep his employees safe. Desjardin Tr. 2435.

St. Hilaire confirmed that he was told that the company had zero tolerance for threats. St. Hilaire Tr. 2672. He acknowledged he was contemporaneously told that, with an issue as serious as physical threats, the risk for the company was too high and termination was required. St. Hilaire Tr. 2684. St. Hilaire made clear that the issue of unionization never came up while he was discussing this issue of threats with Jones and Desjardin. St. Hilaire Tr. 2719, 2712-2715. Indeed, he claimed that he was friends with Desjardin (St. Hilaire Tr. 2636) and that Desjardin and Jones wanted to consider carefully his arguments and investigate, so at first only suspended him without pay. St. Hilaire Tr.

2642; Desjardin Tr. 2433 (wanted to investigate further first). This shows that St. Hilaire, himself, saw no evidence of animus against him; they were trying to consider the matter carefully to be fair to him. St. Hilaire's potential involvement in unionization was never discussed or considered. Desjardin Tr. 2434, 2436. However, while he was suspended, he then sent another text message threatening Lasko again. R. ex. 13, p. 2 ("You're a piece of shit. You better watch your back. Don't even look at me at work. If you do, I'll hit you.") *See* St. Hilaire Tr. 2665-6 (not denying that he contacted Lasko while suspended); *id* at 2656 ("can't recall").

Even St. Hilaire confirmed the real reason he was terminated was because of the threats and his "misconduct", not because of union activity. St. Hilaire Tr.2653. His statements to others provided substantial evidence that he himself believed the real reason he was terminated was because he made physical threats of violence. St. Hilaire Tr. 2646-8 (unemployment application in which he admitted that the reason he was terminated was because of misconduct and threats);[6] St. Hilaire Tr. 2667 (discussing his private conversation with Rucci in which he told Rucci that the reason he was terminated was for threatening Lasko, and Rucci said that they both should have been terminated). St. Hilaire acknowledge that he could not substantiate his side of the story and that he had none of the documentary evidence that Lasko did to prove his claim. St. Hilaire Tr. 2673-74. Indeed, when St. Hilaire left his employment, his last words with Judy were about a fake Workmen's compensation claim, in which he threatened she would have to talk to his workmen's compensation attorney henceforward, but tellingly never mentioned a labor attorney about his union claim. St. Hilaire Tr. 2678-79, 2681.

[6] The ALJ prohibited further inquiry into this issue and USCC takes exception to that ruling.

The documentary evidence was substantial, and provided written contemporaneous evidence that St. Hilaire was terminated because of his threats of physical violence. R. ex. 13. In light of this substantial evidence, the NLRB must find that St. Hilaire was terminated for violating company policy by making repeated physical threats of violence to a co-worker, which is a criminal offense in Connecticut. *Local One, Amalgamated Lithographers of America, AFL-CIO v. NLRB*, 729 F.2d 172 (2d Cir. 1984)(substantial evidence in proceeding to review retaliatory discharge claim, including fact that employer had a policy against using drugs or alcohol at work, and that employees knew about the policy, supported determination of National Labor Relations Board that employer fired members of union-organizing committee not to discourage union activity, but for smoking marijuana on company property).

"[E]ven when an employee is engaged in protected activity, he or she may lose the protection of the Act by virtue of profane and insubordinate comments." *Verizon Wireless,* 349 N.L.R.B. 640, 642 (2007). But not all such behavior results in a loss of protection; rather, "employees are permitted some leeway for impulsive behavior when engaging in concerted activity... balanced against an employer's right to maintain order and respect in the workplace." *Id.* (internal quotation marks omitted);*accord Caval Tool,* 262 F.3d at 192 ("[E]mployees receive some leeway since passions may run high and impulsive behavior is common."). To determine, in some contexts, whether an employee has lost the protection of the Act, the Board considers four factors: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." *Atlantic Steel Co.,* 245 N.L.R.B. 814, 816 (1979). Here,

St. Hilaire does not contend that his threatening outburst were in any way provoked by his alleged union activity.

a. The GC Cannot Sustain Its Burden of Showing That The Timing of the Discharges Disproved USCC's Reasons Given for the Termination of St. Hilaire

It is clear that the timing of the terminations had nothing to do with the protected activity. Rather, it corresponded precisely with when a Production associate, Jon Lasko, came forward with credible allegations against St. Hilaire. Lasko Tr. 1632-35, 1642,1644-45; R. ex. 13; Desjardin Tr. 2426. There is no possibility that the timing or content was contrived, because St. Hilaire himself admitted that he did in fact threaten Lasko with physical violence during the time period in question. St. Hilaire. Tr. 2629:21-2630:20; 2631:22-25. St. Hilaire himself admits that the timing corresponded with his threats and that both Jones and Desjardin contemporaneously confirmed that they had reviewed the text messages he sent to Lasko and the texts were indeed threatening physical violence. St. Hilaire. Tr. 2632-33, 2635.

b. The GC Cannot Sustain Its Burden of Showing That Disparate Or Inconsistent Treatment Disproves USCC's Reasons Given for the Termination of St. Hilaire

The GC has failed to come forward with a single instance of when another employee had threatened physical violence against an employee, without being terminated. Although the GC claimed that one other employee had been involved with loan sharking, at worst, all that involved was charging a high interest rate, which is not even a civil offense. It most certainly is not a criminal act. Jones properly distinguished between the seriousness of the criminal conduct of St. Hilaire, which threatened serious violence, and the far less serious offense of charging a high interest rate. Jones Tr. 2233-

34. With regard to St. Hilaire's highly suspect, *post fact* allegation of drug use by Lasko, Jones properly took into account the lack of credibility of that retaliatory allegation. Jones Tr. 2234-6. Nevertheless, Desjardin looked into the allegation of drug use and found that it was without basis. Desjardin Tr. 2437-39.

c. The GC Cannot Sustain Its Burden of Showing That Expressed Hostility Toward The Protected Activity Disproves USCC's Reasons Given for the Termination of St. Hilaire

The non-management production associates were unanimous in their agreement that they never witnessed anti-union animus. St. Hilaire Tr. 2712-15; Hoar Tr. 1577; McCoil Tr. 1430-32; St. Hilaire Tr. 2711-12; Lasko Tr. 1623.

d. The GC Cannot Sustain Its Burden of Showing That There Was a Departure From Past Practice that Disproves USCC's Reasons Given for the Termination of St. Hilaire

As set forth above, the GC has never produced a similarly situated employee. The GC cannot sustain its burden of showing that any other employee who has made serious threats of both physical violence and property damage (slashing tires) and then tried to lie about it (until finally admitting it) has not been terminated.

e. The GC Cannot Sustain Its Burden of Showing That There Were Shifting Or Pretextual Reasons Being Offered for the Termination of St. Hilaire

As set forth above, St. Hilaire made absolutely clear that the reasons he was given for his termination contemporaneously, and the reason that he provided to the unemployment agency for his termination, was the threats of physical violence to Lasko that he indeed admitted he made. St. Hilaire Tr. 2653, 2654.

2. USCC Has Produced Substantial Evidence That It Terminated Hoar Because He Engaged In Theft of Company Property

Two separate witnesses, neither of them management, came forward to inform management that they had directly observed Hoar steal company property on multiple occasions. R. ex. 1; R. ex. 11; R. ex. 21; R. ex. 18; R. ex. 19; R. ex. 20.[7] Desjardin testified that two hourly associates, Andrew Rucci and Jacob Rodrigues, reported to him that Hoar took a carton of coffee and put it in his car. Tr. 2440. He had the associates repeat this to the H.R. manager, Jones, which they did. Tr. 2440-7. Rodrigues told them that he also saw Hoar stealing food (coffee and soup) from the cafeteria and put it in his car, lock his car and then go back to work. Tr. 2447-8. Desjardin made clear that any claim by Hoar that he was moving the food from one plant to another was false, and would not be authorized. Tr. 2451-55.

Hoar did not deny that he was told contemporaneously that he was being terminated for theft and that two witnesses came forward and informed the company that they observed him stealing. Hoar Tr. 1590- 1594. Hoar's *post hoc* justification that he introduced for the first time at the hearing -- that he was allegedly just moving it from one plant to another -- was never articulated during his interview with Jones and Desjardin about his theft of coffee and soup. Tr. 2456-59. Hoar did not deny taking the boxes of soup packets and putting them in his car. Tr. 1405-06; 1594.

Hoar attempted to claim at the hearing that he was just moving the soup from one plant to another. However, the documentary evidence did not reveal that Hoar had ever raised such an argument before. R. ex. 1; R. ex. 11; R. ex. 21; R. ex. 18; R. ex. 19; R. ex. 20[8].

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[7] USCC takes exception with respect to those exhibits that were not admitted.

[8] In this Circuit, an ALJ's credibility findings receive deference, but not when they conflict with undisputed documentary evidence. "We will not disturb the Administrative

Moreover, his claims on this score shifted and were incredible. First, he claimed he was moving the soup from Plant 1 to Plant 4 on July 24. Tr. 1594. Then, when he realized he was caught because he was not even assigned to Plant 4 that day, he shifted his claim and said he transported it to Plant 2 on July 24. Tr. 1595. Moreover, Rucci –an eyewitness to the theft – testified that both he and Rodrigues saw Hoar steal the coffee packets that are in boxes from the cafeteria, load them into his car, shut the car door, and then return to the plant. Tr. 2748-9. He reported this to Jones after he heard employees discussing the missing coffee and became concerned the privilege might be taken away. Tr. 2748-54. He confirmed that no food or drink is permitted outside the cafeteria on the production floor and Dennis Desjardin reiterated that to his employees repeatedly. Tr. 2754-56. Rucci knew that Hoar was not just moving the coffee from one plant to another because when he clocked out that day, he saw the coffee in Hoar's car's back seat, partially covered with a sweatshirt to hide what he had stolen. Tr. 2757-59. Rucci had complained to Hoar in the past about his hoarding the food and removing it and Hoar claimed he was taking it home to his brother. Tr. 2767-8.

Takagi testified that theft violated the core values that were posted throughout the plant concerning conducting oneself with good faith and dignity. Tr. 501-2, 508-9, 517. Even the ALJ acknowledged on the record that thievery is wrong. Tr. 579. Takagi

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Law Judge's ("ALJ") credibility determinations, however, unless they are "hopelessly incredible or the findings flatly contradict either the law of nature or undisputed documentary testimony." *NLRB v. Thalbo Corp.,* 171 F.3d 102, 112 (2d Cir.1999) (quotation marks omitted); *see also NLRB v. Dinion Coil Co*., 201 F.2d 484, 487 (2d Cir.1952) When the Board's findings are based on the ALJ's assessment of the credibility of the witnesses, they will not be overturned unless the testimony is " 'hopelessly incredible' " or the findings " 'flatly contradict' either the 'law of nature' or 'undisputed documentary testimony.' " *NLRB v. J. Coty Messenger Service, Inc.,* 763 F.2d 92, 96 (2d Cir.1985) (quoting *NLRB v. American Geri-Care, Inc.,* 697 F.2d at 60); *see, e.g., NLRB v. Gordon,* 792 F.2d 29, 32 (2d Cir.), *cert. denied*, 479 U.S. 931(1986).

testified that Rucci and Rodrigues had brought forth the complaints to management. Tr. 499-500. Theft is also a breach of the Code of Conduct. Tr. 501. *See N.L.R.B. v. Starbucks Corp.,* 679 F.3d 70, 82 (2d Cir. 2012) (overturning ALJ's finding that Starbucks would not have fired employee Gross absent his union activity because, "[w]hile Gross may not have been a model employee, ... he was proficient in preparing beverages and customer service[,] ... [and h]is cash-handling skills were adequate," the employer is entitled to conclude that adequate performance does not insulate from discharge an employee who fails to abide by legitimate employment policies.)

a. The GC Cannot Sustain Its Burden of Showing That The Timing of the Discharges Disproves USCC's Reasons Given for the Termination of Hoar

There was substantial evidence that the timing of the discharge was directly related to the date that the two employees reported Hoar's theft. The investigation followed promptly thereafter; the meeting with Hoar was contemporaneous and prompt, and his termination occurred during his interview with Jones and Desjardin. Thus, the temporal proximity creates no negative inference because it is directly explainable by the timing of the co-workers' complaints, over which management had no control. R. ex. 1; R. ex. 11; R. ex. 21; R. ex. 18; R. ex. 19; R. ex. 20.

b. The GC Cannot Sustain Its Burden of Showing That Disparate Or Inconsistent Treatment Disproves USCC's Reasons Given for the Termination of Hoar

The GC's witness Mike McCoil tried to claim that there was an instance when he saw Andrew Rucci take Gatorade and put it in his car. McCoil is an inveterate liar (Jason Martin Tr. 2333-34) who has been convicted multiple times of burglary, of

obtaining an illegal prescription drug and fraud, and larceny. McCoil Tr. 1294-1297; 1301, 1311-15. R. ex. 4, 5, 6, 7.[9] Moreover, McCoil did not claim that he ever brought this to the attention of management himself. He did not claim that it was ever brought to the attention of the same decisionmakers – Jones and Desjardin – involved in the termination of Hoar. He attempted to claim by inadmissible hearsay that he thinks someone told Jason Martin – a lead, not a supervisor. Tr. 1284. However, he did not know who might have told Martin and his only evidence that Jason might have been informed of this was that Jason allegedly asked if anyone knew where Rucci was, to which McCoil said "I don't know, I think he went out to his car." Tr. 1285. Moreover, there was no documentary evidence to support this claim. GC ex. 7.

According to McCoil, it happened more than a year after the termination of Hoar, when Jones was no longer working there. It is clear that the McCoil allegation lacks credibility and is brought with retaliatory motive, because Rucci is the individual who accused Hoar of theft. Moreover, this alleged disparate circumstance was never alleged in the GC's complaint. There was no evidence presented that anyone in management, or any of the same decisionmakers in the Hoar termination, were ever told about this *post hoc* contrived claim.

c. <u>The GC Cannot Sustain Its Burden of Showing That Expressed Hostility Toward The Protected Activity Disproves USCC's Reasons Given for the Termination of Hoar</u>

The non-management production associates were unanimous in their agreement that they never witnessed anti-union animus. St. Hilaire Tr. 2712-15; Hoar Tr. 1577; McCoil Tr. 1430-32; St. Hilaire Tr. 2711-12; Lasko Tr. 1623.

[9] USCC takes exception to the ALJ's failure to admit those exhibits, which were properly authenticated. Tr. 1319.

d. The GC Cannot Sustain Its Burden of Showing That There Was a Departure From Past Practice that Disproves USCC's Reasons Given for the Termination of Hoar

The GC has failed to produce any evidence where another reported theft was brought to the attention of management, at all, much less *prior* to the Hoar incident. Thus, it has entirely failed to show a departure from past practices. The GC was provided dozens and dozens of documents concerning past discipline. Not a single one of the disciplinary documents produced related to theft.

e. The GC Cannot Sustain Its Burden of Showing That There Were Shifting Or Pretextual Reasons Being Offered for the Termination of Hoar

Hoar admits that he spoke with Judy Jones about the accusation of his theft on July 24, Tr. 1590-91, that she told him two employees witnessed the theft, Tr. 1592, and he admitted he took the items to his car. Tr. 1594. Indeed, he swore to the State Unemployment Agency that the actual reason for his termination was theft. Tr. 1596. R. ex. 12. He admitted that is the reason he said he was terminated. Tr. 1598. Hence, it is beyond cavil that the consistent explanation for his termination has been that he stole company property. There is no evidence of shifting explanations, and thus no evidence of pretext. *See, e. g., Holt v. KMI–Continental,* 95 F.3d 123, 130 (2d Cir.1996) (affirming grant of summary judgment for defendant on retaliation claim where plaintiff failed to put forth any evidence, beyond her own personal belief, that the defendant's articulated nondiscriminatory reason for employment action was pretextual).

III. THE RECORD AS A WHOLE DOES NOT SUPPORT A FINDING THAT USCC EXPEDITED A WAGE INCREASE IN ORDER TO DISCOURAGE UNIONIZATION

In *N.L.R.B. v. American Geri-Care, Inc.,* 697 F.2d 56 (2d Cir.1982), the Second Circuit held that the timing of offers of increased benefits may indicate a coercive purpose and effect (*citing NLRB v. Colonial Knitting Corp*., 464 F.2d 949 (3d Cir.1972)) (granting of wage increases on eve of certification election was coercive). However, the Circuit has recognized that a company can "justify the timing of the offer of benefits … to avoid the inference of anti-union action." *N.L.R.B. v. American Geri-Care, Inc.,*697 F.2d 56 (citing *Grandee Beer Distributors, Inc. v. NLRB,* 630 F.2d 928, 932 (2d Cir.1980)).

In the instant case, the GC does not claim that the pay increase was not contemplated well in advance. Tr. 623-24(*see* GC's comments on record). The GC simply claims that the pay raise was expedited for the purpose of discouraging unionization. However, there was abundant testimonial evidence that the pay raise had long been contemplated. Takagi Tr. 584-5. Tiebout Tr. 2939. It was approved more than a month before. Takagi Tr. 593; Takagi Tr. 598-99; Tiebout Tr. 2948-50; Desjardin Tr. 2420 (testifying he notified his two leads in June). Even the production employees admitted they had heard about it before it was announced on July 9 or 10. Lasko Tr. 1647; McCoil Tr. 1450; Martin Tr. 2336-38. Martin learned about it from Desjardin, and shared the information about the pay raise with the other production associates, and they knew it was coming before it was announced. Martin Tr. 2338-2442.

Takagi testified that the amount of the increase was already planned. Tr. 350. There was no connection between the union activity and the wage increase announcement. Tr. 352. Documentary evidence indicated it was merely a "coincidence" Tr. 478. The documentation involved in the pay increase (GC31 and GC 32) shows that

the work entailed in effectuating a pay raise was so extensive, that it could not possibly have been arranged overnight and expedited, as the GC maintains. USCC management testified that they had planned in June to institute it during the second half of the year, which would begin July 1, 2014. Takagi Tr. 598-99; Desjardin Tr. 2420-22 (testifying he told his leads it would be instituted in July). However, they simply had to wait for Takagi to return from Japan, because he wanted to be there for the announcement to see the workers' faces when they learned of the raise. Takagi Tr. 600. The increased pay was reflected in the July 17 paycheck, dating from July 7. Both salaried and non-salaried personnel received such an increase, which makes clear it was not instituted for the purpose of discouraging unionization. Tiebout Tr. 2946-8. Moreover, because it offset removal of certain compensated privileges like the gas card and the American Express card benefits, it was really more of an offset, not an increase. Takagi Tr. 608-09. In fact, there had been annual increases that included COLAs year after year. The most recent one had been in January 2014. Tiebout Tr. 2943, 2941.

St. Hilaire admitted that he knew in June about upcoming wage increases. Tr. 2704. He had no basis to claim that his union activity influenced the wage increase. Tr. 2706. He acknowledged that he had no evidence that wages were expedited to discourage unionization. Tr. 2717. Hoar admitted he had no evidence that the wages were accelerated as a result of the union sign being posted, other than the coincidence of timing. Tr. 1608.

The principles set forth in In *Moccio v. Cornell University,* 889 F.Supp.2d 539 (S.D.N.Y. 2012) make clear that temporal proximity is not persuasive when an action was long planned and contemplated. In *Moccio*, the court reasoned that

> Further undermining any such inference, the record evidence persuasively shows that, unlike in cases where temporal proximity was found to support an inference of causation, the defendants had been considering taking the adverse employment action (the 2008 layoffs, in the Extension Division generally and in the WIED group specifically) in advance of the plaintiff's protected activities. An employer's decision to "proceed[ ] along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality." *Clark Cty. Sch. Dist.,* 532 U.S. at 272, 121 S.Ct. 1508. There is documentary evidence that such layoffs were contemplated as early as December 2007, prior to the last two protected acts (and more than two years after the first two). *See* Defs.' 56.1 ¶ 89; id. Ex. 43 (discussing "trigger[ing] another layoff")

Similarly, in *Clark County School Dist. v. Breeden,* 532 U.S. 268 (2001) held that employers have no obligation to suspend planned actions simply because of the appearance problems posed by temporal proximity. "Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality." *Id.*

IV. THE RECORD AS A WHOLE DOES NOT SUPPORT A FINDING THAT USCC INTERROGATED EMPLOYEES ABOUT THEIR UNION ACTIVITIES

Judy Jones was investigating a vandalism claim brought by Lasko when his locker was soaped up and his clothes were damaged. During the course of the investigation, she was told that Bill St. Hilaire was behind the vandalism. Jones Tr. 860. He paid employees to vandalize Lasko's locker because he was angry at Lasko for telling management about the physical threats, which resulted in St. Hilaire's termination. In order to figure out whether some of those employees had in fact been conspiring with Lasko to commit the vandalism, she considered, but then decided against, asking for their cell phones. However, none of the employees ever testified that Judy Jones asked any of

them about their union activity. There was no allegation that she interrogated employees about unionization at all. McCoil Tr. 1363-65. The documentation regarding that investigation reflects no discussion or inquiries regarding protected activity. GC ex. 13. Hoar admitted that he had no evidence that Jones ever interrogated people about their union activity. Tr. 1609-11. *See also* Lasko Tr. 1810-11.

V. THE RECORD AS A WHOLE DOES NOT SUPPORT A FINDING THAT USCC INTERFERED WITH A NLRB INVESTIGATION BY ALLOWING EMPLOYEES TO SELECT WHETHER THEY WANTED TO HAVE COUNSEL PRESENT WHILE THEY TALKED TO THE NLRB

The memorandum distributed to the employees in this case was admitted as GC-14. From the face of the document, it is clear that it does not require an employee to use the company attorney. It is plainly evident that it was voluntary, and was provided only if the employees wanted to use the company attorney if they were made to feel uncomfortable, or if they felt their words were being twisted by the NLRB investigator. This offer was made after Andrew Rucci complained to Judy Jones that he felt his words were being twisted by Essie Ablavsky, who worked for the NLRB.

In *Florida Steel Corp. v. NLRB,* 587 F.2d 735 (5th Cir. 1979), the Company, after winning the election and during the subsequent Board investigation of unfair labor practice charges, distributed a letter advising the employees that they had a right to consult with counsel prior to talking with the agent and that the Company would recommend an attorney to any employee who so desired. The Fifth Circuit held that the letter was not coercive and contained no threat of reprisal, and referred to the Board's contrary conclusion as "pure speculation and imagination." *Id*. at 750-51. Moreover, the

letter was accurate and objective and did not discourage employees in any way from cooperating with the Board. *Id*. at 752-53.

Likewise, in *NLRB v. Garry Manufacturing,* 630 F.2d 934 (3d Cir. 1980), the Court also rejected that such an offer was coercive. "Similarly, the letter distributed in this case did not tend to coerce the employees. It informed them of a right not to talk with the agent and made reasonably clear the agent's role. Moreover, to the extent that it might have been coercive, the November 30, 1977 letter cured that defect in sufficient time for any employee to talk with the agent or the Board if he or she so chose." Here, the employees were all told they could speak with the NLRB. In fact, McCoil, Lasko, and Rucci all chose to do so, making clear that the employees did not feel like they were being prohibited, coerced or discouraged from communicating with the NLRB.

VI. THE RECORD AS A WHOLE DOES NOT SUPPORT A FINDING THAT USCC ISSUED RULES IN AN EMPLOYEE HANDBOOK THAT WERE DESIGNED TO DISCOURAGE UNIONIZATION, OR WHICH HAD THE EFFECT OF DISCOURAGING UNIONIZATION

The provisions to which the NLRB objects were put in place to protect the lawful confidential and proprietary information of USCC. The handbook reflected a version that Jones brought with her from her previous employer. However, to show their good will and cooperation with the NLRB, USCC re-issued the Handbook, with the allegedly objectionable provisions removed or revised. R. ex. 23. Therefore, the issue is mooted by revoking and reissuing a new Handbook.

For all the above stated reasons, USCC respectfully requests that the charges be dismissed in their entirety.

Respectfully submitted,

USCC

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CERTIFICATE OF SERVICE

I certify that a copy of the above (albeit without typos corrected or this certification) was sent to all parties to this NLRB action at the following email addresses on April 22, 2016, and re-sent on April 23, 2016 with typos corrected and this certification included:

billsthilaire@yahoo.com;
rvs@scaliselaw.com
Howlett, Jo Anne P. [JoAnne.Howlett@nlrb.gov]

/s/ *Kristan Peters-Hamlin* dated: April 23, 2016